

[ORIGINAL CIVIL JURISDICTION]

PEDLOW, J.

April 4, 1939.

SAPIAN BINTE MOHAMED ZIN

vs.

TIAMAT BINTE AJI AND TWO OTHERS.

[MALACCA SUIT No. 32 of 1937]

Malacca Lands Customary Rights Ordinance (Cap. 125)—Naning custom—Pesaka land—Execution—Writ of seizure and sale—Agreement by qualified Purchasers to transfer to unqualified holder—validity.

Two qualified holders, the nominees of an unqualified holder of pesaka land purchased four pieces of pesaka land seized and sold by public auction under a decree of the Court obtained by the unqualified holder. The qualified holders entered into two agreements with the unqualified holder whereby they each undertook to use their best endeavours to have a grant issued for the said lands under s. 10 of the Malacca Lands Customary Rights Ordinance and thereafter to transfer the said lands to the unqualified holder at a nominal consideration. The judgment debtor applied to have the sale declared null and void and set aside on the following grounds; namely, that the qualified holders were only the nominees of the judgment creditor and he was not qualified to be a holder of the lands and also that the sale of the four pieces of land was illegal because a sale by the Sheriff of the Supreme Court of customary land held under Naning custom was invalid and also that the two agreements made between the customary land holders and the judgment creditor was illegal in the sense that all transactions made in respect of it were void.

Held, that the sale of the four pieces of land was not illegal merely because it was sold at the request of the Supreme Court under a writ of seizure and sale and that the Collector is not put on enquiry as to whether the person claiming to be registered on a sale is a nominee or as to where he got the purchase money whether from a nominator or not and it is sufficient if the purchaser's credentials as a Malacca customary land holder modified where necessary by Naning custom are in order and accordingly the question as to the legality of the agreement did not arise.

SUMMONS.

W. H. Salt for plaintiff, the judgment debtor.

C. S. Jayaswal and *F. R. Massey* for qualified land holders.

F. R. Massey for judgment creditor.

The facts and arguments appear sufficiently from the judgment.

Cur. Ad. Vult.

PEDLOW, J.—The third defendant in this suit obtained a decree against the plaintiff in Suit No. 67 of 1937 and by virtue of that decree seized and sold by public auction at Alor Gajah on the 20th day of June, 1938, four pieces of Malacca customary lands belonging to the plaintiff. These four pieces of land were "pesaka" lands belonging to the tribe of "Munka Kuala Ina" and therefore the lands could only be sold to female members of that tribe. The lands

were purchased at the auction by the first and second defendants who are female members of the Mungka Kuala Ina tribe. The third defendant, being a male and not a Malacca customary land-holder, was not entitled at law to become a registered holder of these lands.

The plaintiff now claims to have the sale declared null and void and set aside and to have the mukim register rectified by expunging the entries of transfer on the ground that the first and second defendants were nominees of the third defendant.

By an agreement, Exhibit C, made on the 20th day of June, 1938, between the first defendant and the third defendant the first defendant undertook to purchase the lands with money provided by the third defendant and, on the registration of the lands in her name, to use all her endeavours to have a grant or lease issued for the said lands under section 10 of the Malacca Lands Customary Rights Ordinance (Cap. 125), and thereafter to transfer the lands to the third defendant in consideration of the sum of \$1.00. If these transactions were carried out the first defendant was not to repay to the third defendant any of the money advanced to her for the purchase of the lands, but if the transactions fell through the first defendant was to be liable to the third defendant for the money advanced. The first defendant undertook under the agreement to sign promissory notes for the amounts advanced. Further she undertook to hand over to the third defendant all the profits arising from the said lands whilst in her possession.

The second defendant was not a party to this agreement originally but having bid at the auction, not with a view to purchase but merely to encourage others, one of the lots was knocked down to her. It is alleged that she thereupon adopted the agreement Exhibit C, and it was admitted that the first defendant paid for the lot which the second defendant bought out of the money advanced to the first defendant by the third defendant.

The term "nominee" is nowhere defined but it would appear from the agreement C that the first and second defendants were nominees in the ordinary sense of the word in respect of the purchase of these lands.

Ordinance No. 125 nowhere in direct terms forbids purchase by a nominee. Section 30 states that "the registration of a mutation upon a genuine transfer or transmission by the registered holder of customary land . . . shall be taken in all Courts as conclusive evidence that the person named therein as registered holder . . . is absolutely and indefeasibly entitled to be registered as holder thereof," but allows the title of such holder to be questioned on the grounds

of fraud or misrepresentation to which he is proved to be a party.

Plaintiff's debt to the third defendant was a sum of \$3,600.00. The land was sold for something under \$2,500.00, but in agreement C the third defendant undertook, if the lands were ultimately transferred to his name, not to sue the plaintiff for the unsatisfied portion of the judgment. I have not been able to discover what the plaintiff stood to gain by this litigation. Assuming she were successful, her debt of \$3,600.00 would revive and it would seem that that is more than the market value of the land.

Further the fraud alleged was argued by plaintiff's counsel to be a fraud not on the plaintiff herself but rather on her tribe in that if these transactions in respect of the lands were carried out there would be no money for "ganti pesaka," i.e. to buy other lands to be held under the same Naning custom. But that seems no real argument because that is exactly what happens when any land is converted by the Governor-in-Council from customary land to grant or leasehold. The misrepresentation was presumably, though the point was not argued, that the purchasers were nominees and not persons who were going to receive the profits arising from the land.

The third ground for setting aside the sale was the general one, that agreement C was an illegal agreement in that it was designed to defeat the purpose of Ordinance No. 125 and that, therefore, all transactions under it were void and should be set aside.

There was some discussion as to whether the plaintiff was herself of the tribe "suku mungka kuala ina" or of the tribe "suku semelanggang naning." The preponderance of evidence seemed to be that she was of the latter tribe, that her interest in the land was only a life interest which arose by gift and that on her death the land was to return to the suku mungka kuala ina. The point, however, seems immaterial for the purposes of the present case.

The Malacca Lands Customary Rights Ordinance is a very inconclusive one and one difficult to interpret. A number of points are left entirely in the air. I mention, for example, the question whether a mortgage under the Ordinance is in the nature of a mortgage or of a charge, and, if it is in the nature of a mortgage, whether a non-customary land-holder can be a mortgagee. A question also arises whether there can be a lessee and, if so, whether such lessee can be a non-customary land-holder. The object of the Ordinance seems to be to maintain Malacca customary lands as far as possible in the possession of Malacca customary land-holders and to define the rights enjoyed by such land-holders.

Section 29 of the Ordinance reads as follows:—

"No mortgage or sale of any interest in any customary land in Malacca shall be valid unless made in accordance with this Ordinance."

What that means is very difficult to determine. Sale, from the language of the rest of the Ordinance, would seem to be a public sale under the provisions of the Ordinance rather than a private sale amongst customary land-holders. The only such public sale for which the Ordinance lays down any rules is a sale under a mortgage. The first big problem then arising is whether a sale by the Sheriff of the Supreme Court in execution of a decree is valid or not. Up to the present no one ever seems to have questioned the validity of such a sale. To bring it within the frame-work of the Ordinance when a Sheriff sells customary land he in practice gets an officer of the Land Office to sell the land for him in the presence of the Collector as prescribed in section 27 (2) of the Ordinance.

Section 4 of the Ordinance provides that the provisions of the Registration of Deeds Ordinance (Cap. 121) and of the Conveyancing and Law of Property Ordinance (Cap. 118) shall not apply to customary lands. Had it been intended to exempt customary lands from the power of seizure and sale by the Supreme Court such exemption should be laid down in clear and unmistakable language such as that used in section 4. It would be unwise and against all the principles of legal interpretation to imply such an exceptionally important exemption from the vague and ambiguous language of section 29.

I hold, therefore, that the sale of the four pieces of land in question was not illegal merely because it was sold at the request of the Supreme Court under a writ of seizure and sale.

This brings us to a consideration of the effect of the Agreement C and to the question whether it is an illegal agreement in the sense that all transactions made in respect of it are void. The Collector, under section 13 of the Ordinance, has to be satisfied that the person claiming is entitled to be registered. That, as I understand it, means he has to be satisfied that the person, in the case of a sale, is a Malacca customary land-holder, and where land is further "pesaka" land, that the purchaser claiming to be registered is a female member of the appropriate tribe. He has also to guard against personation and fraud. I do not consider that the Collector is put on inquiry as to whether the person claiming to be registered is a nominee or not, or as to where he got the purchase money, whether from a nominator or from, say, the proceeds of a gang-robbery the night before. It is sufficient if the purchaser's credentials as a Malacca customary

land-holder, modified where necessary by Naning custom, are in order.

It is admitted that the pieces of land were tanah pesaka of the Suku Mungka Kuala Ina and that the first and second defendants were female members of that tribe and as such were entitled to be registered as the holders of those lands.

The question whether Agreement S is an illegal agreement in that its object may be, if a Court so decided, to defeat the objects of Ordinance No. 125 is not one which, in my view, arises in the present case. It may well arise if and when either of the parties to that agreement seeks to enforce in the Courts its provisions against the other. The Court would then have to consider whether or not it was illegal, and if it were unlawful it follows that it could not successfully be sued on. The maxim applicable is 'in pari delicto potior est condicio defendentis' (*per* Maugham J. in *In re the National Benefit Assurance Co.*, 1931, 1 Ch. at p. 58). But on the view I have taken of this case the question does not arise for my consideration and I make no pronouncement on the question of the legality or illegality of Agreement C.

It follows that no facts have been proved in this case to justify the Court in law or in equity declaring that the sale of the lands in question was null and void and should be set aside.

The plaintiff's claim, therefore, fails and her action is dismissed with costs.

Action dismissed.

[ORIGINAL CIVIL JURISDICTION]

HORNE, J.

April 6, 1939.

CHIA TECK LEONG AND FOUR OTHERS

v.

ESTATE AND TRUST AGENCIES (1927),
LIMITED.

[SINGAPORE SUIT No. 185 of 1938]

Limitation Ordinance (Cap. 16), art. 97—Claim as lawful issue of a secondary wife of a Chinese, for administration—Defence denying legitimacy—Laches and long acquiescence—Indian Marriage Act (V of 1865), ss. 5 and 9—Christian Marriage Ordinance (Cap. 82), s. 3—Polygamous union between a Chinese and a Christian—Whether a non-Christian Straits Chinese can marry a Christian woman as a secondary wife.

The Plaintiffs claimed as beneficiaries under the will of a Chinese testator for the administration of his estate. They claimed to be lawful sons by a secondary wife of a son of the testator, and as such entitled to share in the testator's estate under the trusts of his Will. The plaintiff's mother was a Eurasian who had been baptised into

the Roman Catholic faith but thereafter had made no profession of the Christian faith. The defence denied that the plaintiffs' mother was a lawful secondary wife, and pleaded that their claim was barred by limitation, and alternatively by laches and long acquiescence. The defence also set up the provisions of the Indian Marriage Act, 1865, and the Christian Marriage Ordinance, and contended that there could be no valid marriage between a Chinese and a Christian except in accordance with those statutory provisions.

Held, following *Lau Tai Thye v. Leong Yin Khean*, 1934 S.S.L.R. 158; 3 M.L.J. 110 that the substance of the claim was the establishment of the plaintiffs' status as lawful sons of a son of the testator and that the claim fell within the terms of Article 97 of the Limitation Ordinance and was barred because it had not been brought within six years from the date when the right to sue accrued and the plaintiffs attained majority.

Held further:—that there had been undue delay on the plaintiffs' part in preferring their claim, and the doctrine of acquiescence and laches would apply apart from any statutory bar.

Held also:—that the evidence established that the plaintiffs' mother was a lawful secondary wife of the testator and that the provisions of the Indian Marriage Act 1865, did not invalidate the union.

Semble:—the Indian Marriage Act 1865 and the Christian Marriage Ordinance (Cap. 82) only apply to marriages in the Christian or monogamous sense, and not to Chinese marriages in the Straits Settlements where polygamy among the Chinese is recognised.

Also:—that, if an individual is baptised as an infant in the Christian faith but never makes any definite profession of faith thereafter, then even though he may have attended a Christian school this is not sufficient evidence that the individual is a Christian for the purpose of s. 5 of the Indian Marriage Act of 1865.

WITNESS ACTION.

A Chinese, Chia Ann Siang died in 1892 leaving a will by which he directed his immoveable estate to be sold after the death of his four sons and divided among the sons or adopted sons of his sons in certain proportions. One of the four sons, Chia Keng Chiang died in 1908, and his sons, if any, would be entitled to a sixth share of the testator's estate. The bulk of the estate was distributed under the directions of the Court in 1921 on the footing that Chia Keng Chiang had died leaving no sons or adopted sons. The defendants were the administrators *de bonis non* with the will annexed of the testator, and there were certain proceeds of sale of the remaining estate for distribution by them.

The plaintiffs were the sons of Chia Keng Chiang by a woman named Blanche Richards who was a Eurasian baptised into the Roman Catholic faith. They alleged that Chia Keng Chiang married Blanche as his secondary wife in 1889 and that they were legitimate children of this union and therefore entitled to a sixth share of the estate under the will. The eldest plaintiff was born in 1892, and the youngest in 1908.

The writ in the action was issued in 1938 and in it the plaintiffs claimed as persons beneficially interested under the will of the testator to have his real and personal estate administered.